

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA

7/1493-264

ARTHREX, INC.,  
a Delaware Corporation,

Plaintiff,

v.

INNOVASIVE DEVICES, INC.,  
a Massachusetts Corporation,

Defendant.

Civil Action No.  
99-851-CV-ORL-18CDECLARATION OF DENNIS D. DONNERMEYER

I, Dennis D. Donnermeyer, hereby declare as follows:

1. I am the Vice President of Research of Plaintiff Arthrex, Inc. ("Arthrex").
2. In September 1996, Joe Garbo, an Arthrex distributor in Houston, Texas, informed me of a new tendon loading technique for cross-pin fixation that had been disclosed to him by Dr. Jeffery M. Whelan, an orthopedic surgeon at the Kelsey-Seybold Clinic in Houston, Texas. Shortly after my discussion with Mr. Garbo, I spoke with Dr. Whelan about the new technique, and Dr. Whelan agreed to make a videotape for me describing the technique. I wrote Dr. Whelan a letter on September 26, 1996 confirming our discussion,

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and received the videotape (Exh. D) from Dr. Whelan shortly thereafter. I also received a copy of the non-disclosure agreement signed by Dr. Whelan and Mr. Garbo (on behalf of Arthrex) dated September 19, 1996 (Exhibit A hereto), and a copy of Dr. Whelan's invention disclosure, also dated September 19, 1996 (Exhibit B hereto), which accompanied the signed non-disclosure agreement.

3. As demonstrated by the sketches of Exhibit B, Dr. Whelan had conceived, at least as early as September 19, 1996, of the surgical technique for loading tendons into the knee for arthroscopic ACL reconstruction including, with respect to claim 1 of U.S. Patent No. 5,918,604, the steps of:

forming a femoral socket;

introducing a flexible strand (green suture) transversely into the socket through a sidewall of the socket (using a beef pin);

pulling a portion of the strand out of the socket entrance (using a "tibial guide" (sic; guide));

engaging a graft (tendon) with the portion of the strand pulled out of the socket ("bring green suture through looped tendon"); and

pulling the flexible strand (green suture) and the graft engaged thereto into the socket ("pull green suture up to blue loop").

4. Likewise, Exhibit B demonstrates that Dr. Whelan had conceived, at least as early as September 19, 1996, of the surgical technique recited in dependent claims 2, 4, 5, 7, 8, and 9 of U.S. Patent No. 5,918,604, namely:

- Claim 2: forming a loop in the strand (green suture) outside the entrance to the socket to engage the graft;
- Claim 4: using a hook ("guild"; sic, guide) to engage the strand and to pull the strand out of the socket;
- Claim 5: inserting the hook ("guild"; sic, guide) into the socket to engage the strand, and retracting the hook and strand (green suture) engaged thereto out of the socket;
- Claim 7: forming a loop in the graft (tendon) and engaging the loop in the graft with the portion of the strand (green suture) pulled out of the socket;
- Claim 8: supporting the graft in the socket ("use green suture to pull beef pin through femur and looped tendons — then place screw over beef pin"); and
- Claim 9: supporting the graft using a transverse implant (screw).

5. On October 19, 1996, I was present at a lab conducted in California with Bill Schultz of Team Surgical (an Arthrex distributor) and Dr. Timothy W. Gibson. During that lab, Dr. Gibson demonstrated a tendon loading technique for cross-pin fixation which he had developed. Dr. Gibson's technique was different from and inferior to Dr. Whelan's technique (which was also demonstrated at the lab, much to Dr. Gibson's dismay) in a number of significant respects (for example, the suture strand in Dr. Gibson's technique does not extend across the femoral socket, and a hook is not inserted into the socket to retract the suture strand), and Arthrex chose not to develop Dr. Gibson's technique. On January 31, 1997, I wrote a letter to Dr. Gibson, advising Dr. Gibson of Arthrex's decision to use Dr. Whelan's previously invented and disclosed technique, and forwarding Dr. Gibson sketches of Dr. Whelan's prior invention. I also noted to Dr. Gibson that "Dr. Whelan had conceived this idea after attending an AANA shoulder meeting in Chicago." (The AANA meeting in

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Chicago was a shoulder lab, and was different from and was held prior to the Fall 1996 AANA Meeting held on November 21-24, 1996 in Palm Desert, CA). A copy of my letter and enclosure is attached hereto as Exhibit C.

6. I attended the Fall 1996 AANA Meeting which is referenced in paragraph 5 above and in the Declaration of Alan Chervitz dated October 14, 1999. I recall bringing with me to the Fall 1996 AANA Meeting instruments for demonstrating Dr. Whelan's technique, talking to other Arthrex personnel at the meeting about Dr. Whelan's technique, and demonstrating Dr. Whelan's technique at a cadaver lab performed at the meeting.

7. As stated by Mr. Chervitz in his Declaration, John McPherson attended the Fall 1996 AANA Meeting, and, at that time, was an employee of an Arthrex distributor, namely Pacific Medical. As an Arthrex representative, Mr. McPherson worked at the Arthrex booth and was privy to conversations between Arthrex personnel (employees of Arthrex and Arthrex representatives employed by Arthrex distributors). Apparently, if Mr. Chervitz's averments regarding Mr. McPherson's recollection are correct, Mr. McPherson participated in conversations with Arthrex personnel at the meeting in which Dr. Whelan's technique was discussed. Likewise, Mr. McPherson's recollection of the "open cadaver laboratory" must have been the cadaver lab of the Whelan technique which we conducted at the meeting.


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I hereby declare under the penalty of perjury that the forgoing is true and correct to the best of my knowledge.

Date: October 19, 1999

  
Dennis D. Donnermeyer